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Supreme Court of the United States

OCTOBER TERM, 1958

No. [redacted]114

JOSEPH HIRAM HOLT, JR., a Minor by His Next Friend, JOSEPH HIRAM HOLT, and JOSEPH HIRAM HOLT and ELWYNA HOLT, *Petitioners*,

— versus —

THE RALEIGH CITY BOARD OF EDUCATION, a Body Corporate, *Respondent*.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

No further statement of the facts seems necessary in view of the full and complete findings of the District Judge as set out beginning at page 34, Appendix D, of the Petitioner herein filed. These are authoritative and any attempt to paraphrase or summarize them might result in distortion. We respectfully draw attention to these Findings as the only proper back-

ground of factual information. We call the Court's attention to the following statements in Petitioners' "Statement of the Case" which we believe contrary to the facts before the District and Circuit Courts below:

"Minor petitioner was required to attend a racially segregated school to which only Negro pupils are assigned and permitted to attend while passing a public school to which only white pupils are assigned." (Pet., p. 7). The District Court did not find that they were "required" to attend a racially segregated school, but that minor Petitioner was assigned to a school where only Negro pupils were in attendance during the year 1957-58. The District Court did not find that only Negro pupils were "permitted" to attend, as the record reflects that this was the only change of assignment requested by either a white or Negro child to what was formerly a school attended solely by children of the other race. (Pet. Appdx. "D", p. 45; Finding of Fact #25.)

Also, Petitioners state "Minor Petitioner's application for reassignment was refused because of his race and color." (Pet., p. 7). The District Court did not reach this conclusion (Pet. Appdx. "D", p. 62);

Again, "The Respondent School Board maintains a strict policy of operating its schools upon a racial basis." (Pet., p. 7). There is nothing in the record to support this proposition. The Petitioners in quoting the testimony of a member of the School Board in their Appendix at page 93, line 10 from the bottom of the page, omitted the following sentence which appeared after the word "color." and before the word "On": "I didn't think we should deny on account of

color." (Appellant's Brief in the Circuit Court, p. 89). We also again call the Court's attention to the District Court's Finding of Fact and Opinion (Pet., p. 45 and 62);

The facts which Petitioners allege are conclusively indicated by the Transcript of Evidence (Pet., p. 8 and 9) are not supported by the record but are merely conclusions of Petitioner which were urged both upon the District and Circuit Courts.

ARGUMENT

The Court of Appeals below did not err in affirming the Judgment of the District Court denying relief to Petitioners upon the grounds therein stated to the effect that persons aggrieved by the actions of the School Officials of a state may not appeal for relief to the Federal courts until they have exhausted the remedies afforded them by the statutes of the State.

Reasons suggested by Petitioners for granting certiorari must overcome this basic proposition. It is the *only* question arising from the record in the lower courts.

Petitioners' argument in support of their petition is patently beyond the bounds of reason. Their theory seems to be that, in spite of plain statutory language, no exercise of discretion or other attribute of decision is vested in a Board of Education in North Carolina *after* the moment of original assignment. (Finding of Fact #5, Pet. Appdx. "D", p. 35). And to urge such a thesis upon this Court, Petitioners make up for a paucity of persuasive legal reason with an attack on the courts which have decided against them. While it does not fall to Respondent's lot to adjudge the tem-

perence of Petitioners' presentation, yet it is manifest that the Petition filed is but a prelude to a hoped-for opportunity for more extensive vilification of the judiciary of the Fourth Circuit, in particular, and any Court, in general, which perchance happens to reach different legal and factual conclusions from their own.

Basically, the burden of Petitioners' position is that administrative remedies provided by State Statute have no place in any consideration of a request by a Negro child for admission to a school previously attended by white children. In other words, Petitioners urge that the North Carolina General Statutes, Sections 115-176 et seq. (Pet. Appdx. "G", p. 68-70) are really of no moment under Petitioners' view of *Brown* v. *Board of Education*, 1954, 347 U.S. 483, 74 S. Ct. 686, 98 L. ed. 873; 349 U.S. 294, 75 S. Ct. 743, 99 L. ed. 653. It is suggested, therefore, that in these instances the Federal Courts will require that relief automatically be the result of application and demand begets injunction.

An examination of North Carolina General Statutes, Sections 115-176 et seq. will show the procedural steps in the assignment of pupils in the public schools of North Carolina. Simply put, a county or city Board of Education gives written notice of assignment for the next school year to each individual pupil, white and Negro, at the end of each year. In this case, such assignment accompanied minor petitioner's report card (Finding of Fact #5, Pet. Appdx. "D", p. 35). The Statute goes on to provide that a parent or guardian who is dissatisfied with the assignment thus made may apply in writing for reassignment to a different school and, upon rejection by the Board and notice thereof, may further "apply to the board for a hearing

and shall be entitled to a prompt and fair hearing on the question of reassignment of such child to a different school". The Statute further provides "A majority of the board shall be a quorum for the purpose of *holding such hearing and passing upon application for reassignment*, and the *decision* of a majority of the members present at the hearing shall be the *decision* of the board". (Italics supplied)

If we read the Petition correctly, it seems to ask this Court to reject the holding of the Court of Appeals on the ground that the North Carolina Statute does not mean what it says—that if it is to "determine and decide" a Board must do so prior to assigning a pupil originally and before any application for reassignment is even lodged. Any other view, according to Petitioners is a "graft" of "judicially created power, right and privilege. . . ." upon the statutory provision. Respondent says simply that such argument is not only strained but far beyond comprehension in the light of precedent.

Petitioners' reasoning would lead this Court to ignore the plain language of the North Carolina Statute in many particulars. If Respondent's power of assignment was exhausted at the moment of initial assignment, what then did the Legislature mean by a "hearing on the question of reassignment . . .", by a "decision of a majority of the members present at the hearing . . .", and by the requirement that the Board shall be guided by specified standards in its consideration of an application for reassignment? This is the statutory language which received judicial sanction in *Carson* v. *Warlick*, 238 F. 2d 724, in which case counsel for Petitioners, both in the Court of Appeals and upon Petition for Writ of Certiorari, attempted to

secure nullification of the North Carolina Pupil Assignment Act upon the *same grounds* as are urged in paragraph 1 of Petitioners' argument in this case (Pet., p. 9). Certiorari was denied in the *Carson* case, 353 U.S. 940, as it should be denied here, if for no other reason than a failure on part of Petitioners to demonstrate sufficient reason under United States Supreme Court Rule 19. See also *Hood* v. *Board of Trustees*, 232 F. 2d 626, cert. den. 352 U.S. 870, 77 S. Ct. 95, 1 L. ed. 2d 76.

Petitioner further chooses to ignore the language of *Briggs* v. *Elliott*, 132 F. Supp. 776, to the effect that:

> "Having said this, it is important that we point out exactly what the Supreme Court has decided and what it has not decided in this case. It has not decided that the federal courts are to take over or regulate the public schools of the states. It has not decided that the states must mix persons of different races in the schools or must require them to attend schools or must deprive them of the right of choosing the schools they attend. What it has decided, and all that it has decided, is that a state may not deny to any person on account of race the right to attend any school that it maintains. This, under the decision of the Supreme Court, the state may not do directly or indirectly; but if the schools which it maintains are open to children of all races, no violation of the Constitution is involved even though the children of different races voluntarily attend different schools, as they attend different churches. Nothing in the Constitution or in the decision of the Supreme Court takes away from the people freedom to choose the schools they attend. The Constitution, in other words, does not require integration. It merely forbids discrimination. It does not forbid such segregation as occurs as the result of voluntary action. It merely forbids the use of govern-

mental power to enforce segregation. The Fourteenth Amendment is a limitation upon the exercise of power by the state or state agencies, not a limitation upon the freedom of the individuals.

"The Supreme Court has pointed out that the solution to the problem in accord with its decisions is the primary responsibility of school authorities and that the function of the courts is to determine whether action of the school authorities constitutes 'good faith implementation of the governing constitutional principles' . . ."

This language has not been contradicted in other Circuits and has been quoted with approval in most. Further, Petitioners mistakenly interpret the *Brown* decisions as a mandate to desegregate all schools on the basis of proximity of residence rather than as a judicial rejection of any racial discrimination growing out of enforced segregation in public schools. In so doing, they urge as precedent for certiorari here *Aaron* v. *Cooper et al*, 358 U.S. 1, 78 S. Ct. 1401, 3 L. ed. 2d 3. This case grew out of an entirely different kind of situation and is of little value here. No placement act was involved, and it was patently evident that the State in that case would not grant any "right" assured by the *Brown* case, even if properly presented. Petitioners urged the Court of Appeals in this case to regard *Aaron* v. *Cooper*, supra, as controlling, but this notion was rejected for obvious reasons. The case is easily distinguishable, factually and legally.

Petitioners flagrantly take the position that a dissatisfied parent or pupil need not substantiate his application for reassignment in any manner and then Petitioners almost contemptuously flaunt their "dare" in the face of the Federal judiciary. (Pet. pp. 14 and 15). They cry out about "inquisitions" and "legisla-

tive and coercive power" of a "defaulting and delinquent" school board when there is no finding with respect to such by the District Judge. As a matter of fact, this kind of protestation is hardly becoming to Petitioners who bring about a delay in the ultimate decision of their cause by refusing opportunity afforded by the District Court to exhaust their remedies (Pet. Appdx. "D", p. 63). Similarly, their attitude in response to the Board's invitation to appear (Finding of Fact #18, Pet. Appdx., p. 42) and their insistence, through counsel, upon technicalities will hardly commend itself in equity.

In summation of this phase of the case, suffice it to say that the statutory language is plain. Can there be a "hearing" if the result can only be one way? Can there be "decision", if divergent views cannot be weighed? Can a "majority" decide, if a minority has no basis for an opinion? These questions answer themselves, and the answers are given force by the sanction of the judiciary. *Carson* v. *Warlick*, supra.

Respondent feels that something should be said in answer to the argument that the Court of Appeals "gratuitously authorizes and commissions school boards, which have denied to Negro public school pupils the constitutional right of desegregated and non-discriminating education to 'interrogate' and 'investigate' their victims upon the very hearing which the deprived pupils and their parents invoke". (Pet., p. 15). The confusion of this reasoning seems to be matched only by its viciousness. Petitioners say that the original assignment was "purposefully racially discriminatory", whereas in fact the District Court never reached this point and no facts thereupon were found (Pet. Appdx. "D", p. 63). Such a view literally puts "the cart before the horse".

However, Petitioners choose to ignore this in an effort to knock out any statute providing for administrative remedies in this field. By the simple expedient of filing a motion, Petitioners would have been back before the Board of Education where the District Court thought they should have been (Pet. Appdx. "D", p. 63). As said by the District Court:

> "There is no way the Court can anticipate what the action of the Board might have been had the plaintiffs pursued the administrative remedies afforded by law by personally appearing before the Board for a hearing. Pure speculation on my part would serve no useful purpose." (Pet. Appdx. "D", p. 63)

To the same effect is *National Lawyers Guild* v. *Brownell*, 255 F. 2d 552, and *Robeson* v. *Dulles*, 235 F. 2d. 811, cert. den. Nov. 5, 1956.

As said by the Court of Appeals:

> "With these and other pertinent considerations in mind the District Judge might not have felt obliged to dismiss the complaint if he had reached the merits of the case, but *he was restricted* in the scope of his decision *by the failure of the plaintiffs to do their part* in giving effect to the plan of the statute." (Italics supplied) (Pet. Appdx., "C", p. 29).

Some slight treatment should be given to Petitioners' argument that they were deprived of the fundamental right of counsel. It does not appear reasonable to us to say that a power of attorney can satisfy the burden imposed upon a party who asks for a hearing and who is supposed to show a board that he is entitled to the relief sought and for which purpose the hearing is demanded. It seems that the matters here

involved are of the non-delegable type which are treated in:

Treat v. *Tolman,* 113 F. 892
Harkins v. *Murphy,* 112 S.W. 136
Restatement of the Law (*Agency*), p. 54, Sec. 17
Meacham on Agency (2d Ed.) Vol. 1 p. 84, Secs. 124 & 125

Finally, one further word should be said about the argument that the Court should stay the application of the doctrine of exhaustion of administrative remedies where such application is prejudicial to the vested property rights of a litigant. Petitioners say that their "interim rights" will "lapse" without redress. Respondent simply says that their rights need not have "lapsed" if Petitioners had chosen to go back to the Board as suggested by the District Judge (Pet. Appdx. "D" p. 63). Cases cited by Petitioners on pages 18 and 19 of the Petition are clearly distinguishable on a factual basis. Where the result of a hearing is a foregone conclusion, there is little use of having one. However, such is not the case here and there is no finding nor suggestion by the District Court that the "remedy" afforded by the statute would not produce a fair and equitable result based upon evidence therein produced.

A decision contrary to that of the District and Circuit Courts would in effect go far towards nullifying the very principle of "exhaustion of administrative remedies". Rules and regulations established by administrative bodies under statutory authority could be ignored, and, as a consequence, State and Federal courts would be called upon to decide appeals without evidence or findings and opinions of government officials directed to perform these duties. It is the opinion of Respondent that such a decision would be disruptive of the entire administrative procedure which

now is responsible for the conduct of a vast majority of State and Federal matters. To grant the Petitioners' Writ of Certiorari would in effect nullify the statutes of North Carolina and the rules and regulations of the School Board adopted pursuant thereto which have been approved by the Federal Courts in the Fourth and Fifth Circuit Courts without exception. The only decisions in the Federal Courts where pupil assignment laws have been circumvented have been under factual conditions where state constitutional or statutory provisions or local governing authorities have announced a policy of refusing to honor a change of assignment under any circumstances and announced a policy of continued segregation in the face of *Brown* v. *The Board*, supra. This is not the history of the North Carolina Pupil Assignment Act nor the administration of the statute in this State. To grant the Petition for Certiorari would be disruptive of the fair and impartial manner in which the State of North Carolina and this Board have proceeded under the Pupil Assignment Act.

CONCLUSION

The Respondent prays that this Court refuse to issue a Writ of Certiorari to review the Judgment and Decision of the United States Court of Appeals for the Fourth Circuit entered in this cause on March 19, 1959, and that the Petition heretofore filed therefor be denied.

Respectfully submitted,

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